

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

76-4083

No. 76-4083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,

Petitioner,

v.

MARQUETTE CEMENT MANUFACTURING CO.
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

REPLY BRIEF FOR THE SECRETARY OF LABOR

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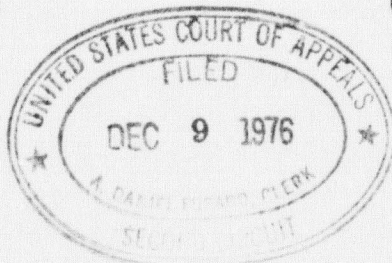
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The Commission strenuously contends (Br. 10) that the parties' stipulation in this case (see opening Br. 7) is tantamount to F.R.C.P. Rule 16 pre-trial order, that in such circumstances the applicability of Rule 15(b)'s liberal amendment policy is "severely limited", and that accordingly "the Commission's denial of the requested amendment was proper exercise of its discretion" (Comm. Br. 19). ^{1/} The short answer is that the argument is misconceived

1/ Rule 16 PRE-TRIAL PROCEDURE; FORMULATING ISSUES provides that:
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
(1/ continued)

since the stipulation here was plainly not a Rule 16 pre-trial order, or its equivalent. 29 U.S.C. 661(f) , section 12(g) of the Act, specifically provides that "unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." But in 29 CFR 2200.51 the Commission provides for "Prehearing Conference" and expressly provides that at such pre-hearing conferences the judge "may direct the parties or their representatives to exchange information...to simplify the issues or expedite

1/ continued

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury'
- (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

proceedings...[and that] the judge may issue a pre-hearing order which includes the agreements reached by the parties."^{2/} It is clear then that the Commission, for purposes of section 12(g) of the Act, has adopted a rule "different" from Rule 16; since in at least one important respect the Commission rule does not provide that the pre-hearing order "controls the subsequent course of the action unless modified at the trial to prevent manifest injustice." It is equally clear that the stipulation in the instant case was not even entered into pursuant to the Commission's rule, which plainly envisions a prehearing order issued by either the judge or the Commission. And it is finally clear that the Commission did not consider this case to involve Rule 16 or the Commission equivalent 2200.51, since neither are mentioned in its opinion.^{3/} Rather, the Commission decision rests upon Rule 15(b) considerations alone and upon the finding that amendment pursuant to Rule 15(b) was improper.

2/ 29 CFR 2200.51, Prehearing conference, provides that:

(a) At any time before a hearing, the Commission or the judge, on their own motion or on motion of a party, may direct the parties or their representatives to exchange information or to participate in a prehearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings.

(b) The Commission or the judge may issue a prehearing order which includes the agreements reached by the parties. Such order shall be served on all parties and shall be a part of the record.

3/ The Commission has recently proposed revision of its rules of procedure. 41 Fed. Reg. 26707 et seq. (June 29, 1976). The current 2200.51 (proposed as 2200.60) would remain the same except that the direction from the Commission or judge to the parties to exchange information or take part in a prehearing conference will be mandatory rather than discretionary.

We think accordingly that counsel's post-hoc injection into these proceedings of Rule 16 F.R.C.P. does not alter the basic question in the case-whether there was implied consent to the amendment and whether the amendment would have prejudiced Marquette. As discussed at length in our opening brief (Br. 15-22), we believe there plainly was implied consent and an absence of prejudice here. Indeed, Marquette admits as much in its brief to the Court (p.4), noting that the facts "are equally relevant whether the case was to proceed on a theory of the specific standard alleged in the complaint or on a theory of a general duty clause violation." The Commission's contention should be rejected.

2. We emphasize that the absence of any participation by the trial judge in the formulation of the stipulation here in itself strongly dictates against giving that stipulation the weight Commission's counsel now suggests it should have. Rule 16 is a discretionary procedural device which a judge may invoke to simplify complex litigation by discovering in conference with the attorneys for each side exactly what facts are really in dispute; what the issues are; how many expert witnesses will be used; and "such other matters as may aid in the disposition of the action". Its purpose is to prevent unfair surprise at trial or "to do away with the old sporting theory of justice and substitute a more enlightened policy of putting the cards on the table." Clarke v. Pennsylvania RR., 328 F.2d 591, 594 (C.A. 2, 1964).

But, this Court has noted that the impartial presence of the judge is essential to the proper operation of a Rule 16 pre-trial conference both with respect to achieving lack of surprise at trial and to the effective formulation of a pre-trial order. See Padovani v. Bruchhausen, 293 F.2d 546, 548 (C.A. 2, 1961) ("For success the leadership, direction, and stimulus of the judge are vital [to the conduct of a Rule 16 conference and issuance of a pre-trial order]"); Eisman v. Samuel Goldwyn, Inc., 30 F. Supp. 436, 438 (D.C.N.Y., 1939) ("that rule [Rule 16] is procedural in nature in which the judge before whom the matter is brought determines, in his discretion, the most feasible way to proceed with the trial"); Wright and Miller, Federal Practice and Procedure, 1971 Ed., ¶1524 at 582-583. As Judge Milton Pollack of the Southern District of New York has describe pre-trial conference (50 F.R.D. 427, 461):

"a judge has to get into these cases and administer them. The lawyers are likely in their advocacy, to run off in different directions; its the judge who brings them back to the issues; it's the judge who shows them where the point of the case is, where the issues are;

* * *

until counsel is up against direct oral questioning by the judge of what actual evidence he has, who are his witnesses and what will they say, the real issues do not emerge."

Because the judge has participated in formal consultation with the parties and issued a formal order, it is true that after the conduct of such a conference the parties are generally bound to the statements made and agreements entered as set forth in the pre-trial order. Curtailment of the otherwise liberal amendment policy of the rules in this situation accordingly provides the court with a potent sanction against attorneys who in contravention of that order, nevertheless introduce a surprise witness or otherwise attempt to evade the pretrial order in circumstances indicating bad faith or unfair advantage. Clark v. Pennsylvania RR, supra, 328 F.2d at 595; Matheny v. Porter, 158 F.2d 478, 480 (C.A. 10, 1946); Globe Cereal Mills v. Scrivener, 240 F.2d 330, 335 (C.A. 10, 1956); Texas and Pacific Ry v. Buckles, 232 F.2d 257, 260 (C.A. 5, 1956), cert. denied, 351 U.S. 984. But absent the judge's participation, and with it the assurance that "the real issues [have] emerge[d]" there is plainly no predicate and little reason to view the stipulation here as either a Rule 16 order or its equivalent. This is especially so in light of both the liberal amendment policy envisioned by Rule 15(b) and the fact that the instant proceeding arises under a remedial statute designed to assure worker protection "as far as possible." The opposite result---to generally apply Rule 16 or its rationale to stipulations entered into without judicial scrutiny---would effectively revive the technical rules of common law pleading abandoned by the F.R.C.P. But as this Court has noted,

Not without careful planning were the federal rules designed to eliminate the evils of special pleading, and they should not be brought back under the guise of pre-trial. Padovani v. Bruchhausen, 293 F.2d 546, 548 (C.A. 2, 1961).

3. Finally even if the stipulation were a Rule 16 pre-trial order or its equivalent, amendment plainly would not and should not be barred. For even with Rule 16 in the picture it is clear that the courts not only remain free to permit amendment, but absent a showing of unfair surprise or prejudice, neither of which exists here, (see main brief, pp. 18-22 and infra p. 9,) have consistently done so under a variety of circumstances. Thus, absent a showing of prejudice or unfair surprise they have permitted the addition to pre-trial orders of issues not originally stipulated to.^{6/} They have, as this court has noted, "not viewed such modifications with hostility."^{7/} They have, moreover, expressly stated that to refuse to permit such amendments "would make a strait-jacket out of a procedural reform which was intended to provide a useful device in the courts' search for truth."^{8/} Finally,

6/ Laguna v. American Export Isbrandtsen Lines, Inc., 439 F.2d 97, 101, 102, (C.A. 2, 1971); Franklin Life Ins. Co. v. Bixeniek, 312 F.2d 365, 372 (C.A. 3, 1962); Jeffries v. U.S., 477 F.2d 52, 55 (C.A. 9, 1973).

7/ Laguna v. Export Isbrandtsen Lines Inc., supra.

8/ Scott v. Spanjer Bros., 298 F.2d 928, 1931 (C.A. 2, 1961) ("The trial judge clearly has the authority to amend or modify a pre-trial order if this becomes necessary in the interest of justice....To hold otherwise would make a strait-jacket out of a procedural reform which was intended to provide a useful device in the courts' search for truth").

they have noted that trial courts are plainly under an obligation to amend pre-trial orders to prevent manifest injustice. 4/ That a liberal view of Rule 16's application is required was made clear, moreover, by this Court in Laguna, supra, where it stated:

"Whether to allow such a modification in a particular case poses nice questions of balancing 'the need for doing justice on the merits between parties (in spite of the errors and oversights of their attorneys) against the need for maintaining orderly and efficient procedural arrangement.'"

What were the key considerations here? Plaintiff was very severely injured and the claim that the ships officers negligently failed to restrain or arrest Gonzalez sooner seems to have been plaintiff's strongest theory, albeit not immediately perceived as such by his attorney. The complaint and the pre-trial order do not explicitly mention this theory, although they contain the generalized familiar statements, which are broad enough to include it.

Plaintiff's theory was made explicit on June 10, 1970. Defendant's response was to object, but no claim of surprise or request for continuance was made before trial. At trial on June 17, defendant apparently did claim surprise but, at least on the record, neither stated why it could not go to trial nor requested a continuance.

Other than the apparent generalized claim by defendant of "surprise", there is nothing in the record to indicate a justifiable reason for not allowing the pre-trial order to be amended. And the "surprise" existed more in theory than in fact. In short, while we are loath to interfere with the trial court's handling of its calendar, we feel that error was committed here [emphasis added].

4/ E.g., Laird v. Air Carrier Engine Service, 263 F.2d 948 953 (C.A. 5, 1959)

As discussed at length in our opening brief, Marquette was not surprised by the Secretary's requested amendment since it addressed the merits of a 5(a)(1) violation in its brief to the administrative law judge and showed no prejudice resulting from that amendment. Indeed, by its own words the facts "are equally relevant whether the case was to proceed on a theory of the specific standard alleged in the complaint or on a theory of a general duty clause violation" (br. at 4). Accordingly, even if the stipulation involved here were a pre-trial order, amendment was properly permitted by the administrative law judge, who we believe was erroneously reversed by the Commission.

4. Both the Review Commission and Marquette continue to argue that there is prejudice here because Marquette did not have an opportunity to present evidence going to the merits of the 5(a)(1) violation, specifically evidence concerning access of employees to the alleyway and the sufficiency of Marquette's safety program (Commission brief at 8-10; Marquette brief at 4-5, 8-11).^{5/} That argument is totally without merit, since access and the adequacy of a safety program are fully as relevant to a 5(a)(1) violation as to a 5(a)(2) violation. Compare National Realty & Construction v. OSHRC and Secretary, 489 F.2d 1257 (C.A.D.C., 1973)

^{5/} Marquette argues that the Secretary cannot contest that its "overall safety and health program was generally effective and that it had never previously been cited for a violation of the Occupational Safety and Health regulations" (br. at 7) because he credited Marquette with these factors in assessment of penalties. The short answer is that the Secretary is not contesting these factors, but only Marquette's admitted lack of any safety precautions taken with respect to the brick disposal practice.

(safety program a defense to a 5(a)(1) violation) with General Electric v. Secretary and OSHRC, 540F.2d 67, (C.A. 2, 1976), (proof of a generally effective safety program is a defense to a standards violation absent showing by the Secretary of what more the employer could have done) See also discussion concerning access in Secretary's opening brief at pp. 25-30. . Marquette admitted in the stipulation that its employees were assigned to work near the alleyway and that it took no measures to protect or warn employees of the intermittent falling brick hazard. This admission as to the total lack of any safety precaution cannot now be gainsaid. Admissions as to factual issues are binding and the issue stands as fully determined as if it had been adjudicated after the taking of testimony at trial. Mull v. Ford Motor Co., 368 F.2d 713,716 (C.A. 2, 1966).

CONCLUSION

For the above reasons and those contained in the Secretary's opening brief, the Commission's order should be reversed, the Secretary's amendment permitted, and the 5(a)(1) citation and proposed penalty reinstated as the Commission's final order.

Respectfully submitted,

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